at any time, and even on appeal, although it was not raised in the Court of first instance. Indeed it would appear to be *pars judicis* to take the objection, if it seemed to the Court to be well founded. It is in our jurisprudence well settled that parties cannot by agreement delay, or otherwise confer jurisdiction upon a Court as regards subject matter." "The jurisdiction of a Court," said the Lord Chancellor in *Donald Campbell & Co.* v. *Pollak,* [1927] App. Cas. at p. 804, "does not depend on the pleadings or admissions of the parties to a suit and, however such a question may emerge, it is (I think) impossible for this House to pass it by and to give its decision on the basis of the existence of a jurisdiction which may or may not have been conferred."

56. It is true that I am in no sense a Court of Appeal from the decisions of the Judges who adjudicated in 1909 and in 1926 but, the point having been taken and established before me, I think I am bound to take the view that the adjudication of 1926 was one made without jurisdiction, since the original jurisdiction of the Court was spent and it had no jurisdiction to reviews its own decision, as if on appeal whatever the parties might plead or not plead, whatever they might agree between them, conceal or ignore. (See cases cited in the *Empire Digest* Vol. 16, sections 162-169).

If I sue upon a simple contract debt and get judgment, the simple contract debt becomes merged in the specialty and ceases to exist. Now then can I again ask a Court to adjudicate on what no longer exists? Similarly if a question has been decided as between trustees and beneficiaries that issue no longer exists betweeen them. [*Cf. Livesey* v. *Harding,* (1855) 21 Beav. 227, 52 E.R. 846; *Peareth* v. *Marriott,* (1882) 22 Ch. D. 182; *Re Surfleet's Estate,* (1911) 105 L.T. at p. 583]. It is true that in all these cases the plea
[151] [151] of *res judicata* was actually raised, but whether it is raised or not, no Court of first instance has any right to purport to decide an issue that no longer exists. [*Cf.* also *Davis* v. *Browne,* (1851) 14 Beav. 127].

57. It is also true that, on the face of things, the Court in the 1925 suit acted within the jurisdiction; but jurisdiction must depend on the real facts of a case and not on mere appearances, and I think there can be no doubt that, had the parties and the Court known of the previous decision, the Court must have said that it had no jurisdiction to decide the issue placed before it or, to put it another way, that its jurisdiction to do so was ousted, once it became apparent that the issue was no longer existent between the parties. The position in this case, to-day, is analogous to that in which a Court has given judgment against a party who is afterwards discovered to be non-existent; in such a case Lord Justice Scrutton (in the *Lazard Bros.* case reported in [1932] 1 K.B. and at p. 624 of that report) gave it as his opinion that if it comes to the knowledge of the Court.....the Court is bound, after hearing the parties interested, of its own motion to set the judgment aside. *Such a judgment is null and void.*" Mr. Koek called my attention to another case the circumstances of which bear some analogy to the present case. In *Great N.W.C. Railway & others* v. *Charlebois & others,* a decision of the Privy Council reported in [1899] Appeal Cases, a declaratory judgment had been obtained, by consent, on a contract, no suggestion being the made by any of the parties that the contract was *ultra vires.* Afterwards a suit was instituted with a view to setting aside the contract and the judgment. "As the contract on the face of it," said Lord Hobhouse (at p. 124 of the report), "is quite regular and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the Court should not decree that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded."

In this case, similarly, once it is established before me that the issue between the parties was then non-existent, the judgment of 1926 on that issue must, in my opinion, be treated as being null and non-existent.

58. The matter may, perhaps, be put in another way, namely, as one of evidence. So far as the present summons is concerned it has been proved and admitted before me that there exists a judgment of this Court, of 1909, deciding the very same issue between essentially the same parties. This is conclusive proof of what the rights of the parties are and I can look to nothing which has happened since that judgment, nor consider that any such thing can have enabled the parties again to canvass those rights.

59. To sum up: I think that the judgment of 1926 must be disregarded, and that the judgment of 1909 decided the question between the parties, and bound and still binds the trustees of the will.

That being the view I take, I realise that it was unnecessary for me also to express the opinion that the order of 1909 laid down a correct construction of this will, while the order and judgment of 1926 did not. I have, however, expressed the opinion, as the Master of the Rolls said in *Peareth* v. *Marriott,* (1882) 22 Ch. D. at p. 192, "for the comfort of the respondent," in this case Tan Yew Ghee. It is open to him, of course, to seek further and better comfort in a higher Court. For the sake of the profession and of further elucidating an interesting point of law I might hope that he would do so; in the interests of the parties, however, I trust that he will think it unnecessary that yet more money should flow away in this litigation.

Order accordingly.

Solicitors: *Chan & Eber; Rodyk & Davidson; Allen & Gledhill.*

IN THE ESTATE OF HAMEED NACHIAL, DECD.

[O.C.J. (Whitley Ag. C.J.) June 3, 1936]

[Singapore Probate No. 64 of 1936]

[Singapore Probate No. 67 of 1936]

Practice — Grant of Probate or Letters of Administration — Probate and Administration Ordinance, 1934, s.54.

The testator, Hameed Natchial died on 30th May, 1935 leaving a will. On the 5th March, 1936 the Solicitor-General prayed the Supreme Court that letters of administration with the will of Hameed Nachial, deceased annexed be granted to the British Malaya Trustee & Executor Co. as his nominee. By a subsequent petition dated 6th March, 1936 Abdul Hameed Maricar as one of the executors named in the testator's will prayed that probate of the will might be granted

to him leave being reserved to Mahamood Maricar the other executor named in the will to come in and prove the same.

Held: [following *Re Vavena Katha Pillay Marican, deceased,* [1934] S.S.L.R. 281; [1934] M.L.J. 205] that the Court had no power to grant letters of administration under section 54 of the Probate and Administration Ordinance, 1934 so long as there was an application for probate actively pending. If an application for probate had been made, such application must be disposed of, that is to say, it must have been withdrawn or not proceeded with or refused before the Court could properly make an appointment under section 54.

[152] [152] **Held further:** that on proper grounds the Court could pass over the executor and refuse to grant probate to him.

Held further: that if and when the Court had decided to pass over the executor and had refused to make a grant to him the Court could subsequently make an appointment under section 54 of the Probate and Administration Ordinance, 1934.

PROBATE PETITIONS.

Walters for Solicitor-General.

Seth for Abdul Hameed Maricar, executor.

E. A. Stevens for the three infant beneficiaries.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Whitley Ag. C.J.: These two petitions were heard together. By the first petition dated the 5th March, 1936, the Solicitor-General in the absence from the Colony of the Attorney-General prayed that letters of administration with the will of Hameed Nachial deceased annexed be granted to the British Malaya Trustee and Executor Company as his nominee and by the second petition dated the 6th March, 1936, Abdul Hameed Maricar as one of the executors named in the will prayed that probate of the will might be granted to him, leave being reserved to Mahamood Marciar, the other named executor, to come in and prove.

The Solicitor-General in his petition deposed that neither of the executors had made any application for probate and that no other person had made any application for letters of administration. He stated that he the petitioner represented the Crown, a creditor of the estate for estate duty.

The Solicitor-General's petition was made under section 54(2) of the Probate and Administration Ordinance, 1934, which reads as follows:—

> In the following cases, namely:—
>
> (a) where, after the expiration of six months from the death of a deceased person, no application has been made for probate or letters of administration to his estate; or
>
> (b) wheer any such application, though made within the
>
> (b) where any such application, though made within the with, or has been withdrawn or refused; or
>
> (c) where any person, who has received a grant of letters of administration with or without the will annexed, neglects within one month of the date of such grant, to give such security as he is lawfully required to furnish; or
>
> (d) where a receiver may be appointed under section 36, but it appears that such appointment would not be a sufficient protection for the estate; or
>
> (e) where an administrator has failed to extract the grant of letters of administration;
>
> letters of administration with or without the will annexed may be granted to the Official Assignee, or to such other person as the Court thinks fit.

It is common ground that the deceased died on the 30th May, 1935, so that more than nine months had elapsed before the Solicitor-General filed his petition. He was clearly entitled to apply under the section and the question at issue is whether representation to the estate should be given to his nominee or to the executor who filed his petition one day later.

It is admitted that *prima facie* the executor is entitled to the grant of probate but it is contended on behalf of the Crown that this particular executor has lost his prior right by failing to apply within six months and that once this statutory period of six months has expired without any application having been made it is open to the Court to make a grant to any applicant whether he has an interest or not.

There is no corresponding section in England, but in a proper case there the Court will by reason of special circumstances pass over the executor named in the will. (*In the Estate of Ray, deceased,* 136 L.T.R. 640 and *In the Estate of Poticary,* [1927] P. 202 where administration was granted to a nominee of the widow and the executors were passed over). The Court will even appoint the nominee of an intending plaintiff who is proposing to sue the estate and is hindered in so doing by reason of the absence of a personal representative of the deceased. *In the Estate of A. B. Simpson,* [1935] W.N. 206. It is clear that under section 54 of our Ordinance the Court has a discretion and that discretion appears to be unfettered except in so far that it must of course be exercised judicially. It is to be observed that no order of priority is laid down in this section similar to that in section 4 where a prior right to the grant is stated to belong to certain persons in specified order. Having omitted such order of priority in section 54 the Legislature must, I think, be taken to have deliberately intended that there should be no priorities under that section. That answers Mr. Seth's technical objection that the petition does ont state the names of all persons having a prior or equal right to the grant as required by Order 54 rule 4 of the Civil Procedure Rules. If the petition were made under section 4 there would have been persons with prior and equal rights. Under section 54 no persons have any right to the grant; [153] it is for the Court to give the grant to "such [153] person as it thinks fit." There is an obvious reason for the distinction. Section 54 only comes into operation after there has been such delay as amounts to laches and by reason of that delay such persons as would otherwise have had a prior right to a grant must be taken to have forfeited their right to such priority. In the present case the persons who have forfeited such right are the executors.

The Solicitor-General would in my opinion have been entitled to file this petition even if the Crown had not been a creditor. Once the period of six months had elapsed it was open for anyone to apply. It would also seem from the observation at the foot of page 199 of *Dymond* on Death Duties 7th ed. that it is open to the Crown to apply as a creditor also. Mr. Seth suggested that in view of section 21 of the Estate Duty Ordinance, 1929 which allows 12 months for the payment of estate duty in a case such as this the Crown is not yet a creditor but it seems to me that the effect of that section is merely to postpone the right to sue. If *A* lends *B* $100 and *B* signs a promis-

sory note payable 6 months later *A* is *B's* creditor during the intervening period although he cannot sue until the due date.

The position then is that there are two petitioners and it is for me to decide to which of the two I think it proper to make a grant. It is open to me either to decide the matter summarily or to order pleadings. All parties are anxious that in order to save delay and expense I should dispose of the matter forthwith. I can see no reason why I should not do so, inasmuch as counsel are agreed that if pleadings were ordered, the only further material before the Court would be an elaboration of the evidence and arguments which I have already heard.

I should mention at this stage that three infant beneficiaries resident in Singapore were also represented at the hearing and that their counsel, Mr. Stevens strongly supported the petition of the Solictor-General.

After hearing the evidence and the arguments of counsel I felt no doubt that I ought to dismiss the petition of the executor and grant letters of administration to the Solicitor-General's nominee and I would have delivered judgment at once to that effect if it had not been that, inasmuch as this was apparently the first case to be decided under the section, it might be desirable to have a written judgment. One or two days later Mr. Seth referred me to a local case which had hitherto escaped his notice and as it was a decision of the Court of Appeal in a matter arising out of the corresponding section in the old Civil Procedure Code I agreed to the suggestion of counsel that I should reopen the hearing for arguments on this new case.

The case in question is *In the Estate of Vavena Katha Pillay Marican,* [1934] S.S.L.R. 281; [1934] M.L.J. 205. There the Official Assignee more than 6 months after the death of a deceased, applied under section 857 of the Civil Procedure Code for letters of administration to the deceased's estate. At the hearing of his application a caveator appeared and propounded a will under which the caveator and another were appointed executors. The will was duly proved.

It was held that there was no jurisdiction, except on sufficient grounds which in that case did not exist, for passing over the executors and making a grant of letters of administration with the will annexed to the Official Assignee, and that the caveator was entitled to a grant of probate leave being reserved to the other executor to come in and prove.

It was further held by Huggard C.J. and Thorne J. (Thomas C.J., F.M.S. dissenting) that the Court has no jurisdiction even after the lapse of 6 months from the deceased's death, to make any grant of letters of administration under section 857 of the Civil Procedure Code so long as there is a pending application for probate by an executor or for letters of administration by a next-of-kin.

Mr. Walters sought to draw some distinction between the wording of section 857 of the old Civil Procedure Code and section 54 of the Probate and Administration Ordinance, 1934 but it seems to me that in so far as the point under consideration is concerned the two sections are substantially the same.

I am of course bound by a decision of the Court of Appeal and Mr. Seth contended that in view of the majority judgment in that case I have no jurisdiction to make a grant to any other person than the executor so long as he has an application for probate before the Court, but upon a careful reading of the judgment of the learned Chief Justice it seems to me that it is still open to me in the present case to pass over the executor if I think fit. The following passages from his judgment indicate his views as to the meaning of the section and the manner in which it should be applied.

"I think it is correct to say that there is no power to grant letters of administration to the Official Assignee or anyone else under section 857 so long as there is application for probate actively pending. In other words, if application for probate has been made, that application must be disposed of, that is to say, it must have been withdrawn or not proceeded with or refused — before the Court can properly make an appointment under section 857."

"In effect, therefore, the learned Judge rejected the executor's application for probate and then proceeded to grant letters of administration with the will annexed to the Official Assignee under section 857. According to my interpretation of that section, as indicated above, I think that the Court below, having disposed of the application for probate, clearly had jurisdiction to make the appointment under section 857."

Thorne J. expressed his entire concurrence in that judgment so that the two passages which I have cited may be taken as laying down the principles which ought to apply. In so far as Thorne J. proceeds to go further than the learned [154] Chief Justice [154] his expressions of opinion are merely the views of a single judge stating his personal ideas as to the probable intentions of the Legislature in enacting the section and whilst I have the greatest respect for that learned Judge I am not necessarily bound by them. That case was decided against the Official Assignee on the ground that there was no sufficient evidence of unsuitability which would justify the Court in overriding the express wishes of the testator and declining to grant probate to the executor. It is clear that if there had been sufficient reasons the judgment of the Court below passing the executor over would have been allowed to stand.

In the present case I am satisfied that there are ample reasons for passing the executor over. From his affidavit of the 21st April, 1936, the day before the hearing and from his evidence and demeanour when cross-examined on that affidavit I formed the impression that he is not a suitable executor to have probate granted to him; that the interests of the beneficiaries would be gravely imperilled if he were given control of the estate and that it is most fortunate for them that the Solicitor-General made his application when the executor had done absolutely nothing for nine months. I have during my experience on the Bench in this Colony come across so many cases of literally appalling loss and hardship suffered by beneficiaries through the carelessness incompetence and negligence

of executors that I feel it my duty to protect an estate when I see an opportunity of preventing it from coming under the control of one who appears to me to come within that category and I am happy to think that it is in my power to place the administration of this very substantial estate in the hands of a respected trust company which can be relied upon to protect the interests of all parties.

The executor offered no explanation whatsoever as to why he did nothing from May, 1935, when the testator died until January, 1936, when he came to Singapore. He says in his affidavit that when he arrived in Singapore he ascertained that the attorneys of the deceased had continued to collect the rents of the estate which would suggest that he knew nothing about that previously. In cross-examination he stated that he assumed that they had been collecting ever since the death. Although their powers of attorney had died with the deceased he allowed them to go on collecting but he got no accounts from them. He knew there was much property in the Colony. He was a most unsatisfactory witness continually fencing with questions. First, he said that he did not remember whether he ever wrote to these attorneys. Then he said he had written a letter — then that he was in constant communication with them and that they had sent him 10,000 to 12,000 rupees since the death but he had complained that was not enough. He admitted that he did not know who are the persons entitled to benefit under the will and had taken no steps to find out. He said that he did not know that Fatima was his father's wife, presumably in order to explain his ignoring of her children but it seems clear from Mr. Tongue's evidence that he together with the rest of the family in India were very well aware that these infants were entitled to benefit under the will. One of the attorneys of deceased was convicted of perjury in connection with *inter alia* the denial of Fatima's widowship and the executor seems to have identified himself with this man. It appears probably that his interests will be antagonistic to those of these infant beneficiaries.

As a result of what I saw of the executor and the evidence as a whole I came to the conclusion that it would be disastrous to the beneficiaries as a whole if probate were granted to him. Accordingly I refused his application and granted that of the Solicitor-General. I directed that the costs of all parties of both petitions be taxed as between solicitor and client on the higher scale and paid out of the estate, there to be only one set of costs for the hearing.

Judgment accordingly.

Solicitors: *Allen & Gledhill; Sisson & Delay.*

Re TAN HOCK KEE

[O.C.J. (Adrian Clark J.) May 1, 1936]
[Singapore Bankruptcy No. 546 of 1929]

Ordinance No. 44 (Bankruptcy), s.55 — Pensions Ordinance, 1928.

The provisions of section 55, sub-section 3 of Ordinance No. 44 (Bankruptcy) cover gratuities in lieu of pensions and indeed all payments made by virtue of the Pensions Ordinance, 1928. The Court is competent to make an order under section 55 of the Bankruptcy Ordinance in respect of a gratuity awarded under the Pensions Ordinance and also in respect of a pension awarded under that Ordinance.

Semble:—Each case must be separately considered on its own merits before the making of any such order. The Court will probably take into consideration the provisions of section 17 of the Pensions Ordinance.

Semble also:—That the Official Assignee ought to make an application in most cases especially where a lump sum gratuity is to be paid to a bankrupt or to ascertain the wishes of the creditors under section 83, sub-section 2 of Ordinance No. 44 as to whether he should do so.

Semble also:—If the Official Assignee does not make any application and the creditors think that he ought to do so their proper remedy is to take action under section 83, 84 or 85 of Ordinance No. 44 (Bankruptcy).

MOTION.

C. P. Burke for the petitioning creditor in support of the motion.

E. N. Taylor for the Official Assignee.

The debtor was not represented.

The facts and arguments sufficiently appear from the judgment.

Adrian Clark J.: In this case the bankrupt was a Government servant. While still in the Government service he was adjudicated bankrupt, and after his adjudication and while still a bankrupt he retired. Before deciding whether a pension, and if so what pension, should be given to him the Government, I am informed, made enquiries in order to ascertain what attitude the Official Assignee would adopt in respect of the proceeds of any pension awarded. The Official [155] Assignee, after considering the circumstances of this particular case and having in mind the decision of the Court of Appeal in England in the case of *In re Saunders; Ex parte Saunders,* [1895] 2 Q.B. 424, stated that it was not his intention to take any action to claim the pension or any part of it. The Government then decided to award to the bankrupt his full pension and, in accordance with his election previously made under Regulation 16 of the Pensions Regulations and recorded, to award a lump sum equal to two and a half times the annual value of his full pension and an annual income of three-quarters of his full pension. Accordingly, a lump sum of $1,780 was paid by the Government direct to the bankrupt and he is now in receipt of a monthly sum, by way of pension, of $44.50. [155]

Mr. Burke on behalf of the petitioning creditor has moved the Court for an order directing the Official Assignee to make application under section 55(3) of the Bankruptcy Ordinance so that a part both of the lump-sum payment and of the monthly income should be made available for distribution among the creditors.

Mr. Burke first argued that the pension had automatically vested in the Official Assignee as the result of the provisions of section 24(4) of the Bankruptcy Ordinance read with those of section 47(1)(b)(i). Now a pension is, in law, of the nature of a voluntary gift from the Government to its former officer since, by section 5 of the Pensions Ordinance, no officer has an absolute right to such a pension. The Government need not award a pension to a bankrupt servant who retires but if it decides to do so both any lump-sum and any monthly income awarded are acquired